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No. 07-619

IN THE

Supreme Court of the United States

PT PERTAMINA (PERSERO),
Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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INTRODUCTION

The Brief for the United States as Amicus Curiae (the "Government Brief") recommends that the Petition be denied because, in the government's view, the Second Circuit's decision is correct and presents no significant circuit conflict. While Pertamina appreciates the government's efforts in expressing its views to the Court, we disagree strongly with its conclusions.

Most notably, the Government Brief does not appear to confront the principal substantive policy issues such injunctions pose for the United States: the international comity concerns and international treaty obligations to which the Second Circuit's decision gives short shrift. The government nowhere addresses the international policy ramifications inherent in the standards for issuing foreign anti-suit injunctions, a question that has divided nine federal circuits. The intrusion on international comity is manifest in this case, where U.S. courts effectively have blocked the courts of the Cayman Islands – and indeed "any court or tribunal" – from hearing Pertamina's lawsuit for fraud, in an international dispute with minimal connection to the United States. Pet. App. 43a.

Nor does the Government Brief confront the significant international law ramifications of the Second Circuit's treatment of the New York Convention. Anti-suit injunctions are anathema to the Convention's program of mutual self-restraint in international arbitration proceedings, in which the

courts of many countries may have overlapping involvement.

These are issues on which the United States' views might have been of use to the Court, but its brief does not address them. Rather, the Government Brief takes a far narrower and, we submit, a far less helpful approach. It merely opines (incorrectly) on the merits of this dispute and applies a crabbed reading of the caselaw to question the materiality of circuit conflicts that are plain to see.

1. The government concedes at least a "potential conflict" between the Second and Eighth Circuits on the question whether a federal court has ancillary jurisdiction to issue a foreign anti-suit injunction after satisfaction of a money judgment, but it characterizes the conflict as "narrow" and "of recent vintage." Gov't Br. 15, 16. On the contrary, the conflict is clear, and it raises an important issue of ancillary jurisdiction that displays the circuit courts' confusion in applying this Court's recent precedents in light of its nineteenth-century predecessors.

2. The government finds the issue of a New York Convention secondary tribunal's authority to issue a foreign anti-suit injunction not to warrant review because the identified conflict involves only two circuits, within the same litigation, and because the Second Circuit "plausibly distinguished" the Fifth Circuit's decision. Gov't Br. 10. On the contrary, the Second Circuit's proffered distinctions are neither correct nor plausible, and the conflict between the circuits implicates a highly significant issue

concerning a court's power under an international treaty.

3. The government recognizes the longstanding circuit conflict regarding the standards for issuing a foreign anti-suit injunction but questions whether the conflict is meaningful (it is), and whether it affects the result in this case (it does). On the contrary, the differences among the circuits' approaches are undeniable, and the reasoning the Second Circuit employed in this case contrasts starkly with that of other circuits, under which the injunction should not have issued.

I. THE GOVERNMENT BRIEF ONLY HIGHLIGHTS THE CIRCUIT CONFLICT REGARDING THE SCOPE OF ANCILLARY JURISDICTION AFTER SATISFACTION OF A JUDGMENT.

The government acknowledges that if the Eighth Circuit's decision in *Goss International Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355 (8th Cir. 2007), is read to mean that "a federal court lacks jurisdiction to maintain an antisuit injunction if its judgment awarded only monetary relief and has been fully satisfied," that holding "would conflict with the Second Circuit's decision in this case." Gov't Br. 16. That is exactly what the Eighth Circuit held. In the words of the Second Circuit, "the Eighth Circuit reasoned that, under *Peacock* [*v. Thomas*, 516 U.S. 349 (1996)], the district court retained ancillary enforcement jurisdiction only '*until* satisfaction of the judgment.'" Pet. App. 38a (quoting *Goss*, 491 F.3d at 365). The Second Circuit

took a different approach, "grounded in the concepts of *res judicata* and collateral estoppel," and found ancillary jurisdiction in order to prevent "relitigating issues . . . that were already decided." *Id.*

Far from dispelling the importance of this circuit conflict, the Government Brief in fact highlights the confusion in this area of law, which "can hardly be criticized for being overly rigid or precise." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379 (1994). The government relies on *Dietzsch v. Huidekoper*, 103 U.S. 494 (1880), a nineteenth-century decision not cited by the Second or Eighth Circuits, which the government invokes for the broad proposition that a federal court has jurisdiction, even after judgment, to ensure that the victorious party retains "'the substantial fruits of [that] judgment.'" *See* Gov't Br. 10-13 (quoting *Dietzsch*, 103 U.S. at 498).

The Government reads too much from *Dietzsch*'s sweeping pronouncement. This Court in *Kokkonen* rejected similar "expansive language" from a turn-of-the-last-century case as "inaccurate" when a litigant argued for ancillary jurisdiction "'to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court.'" 511 U.S. at 379 (quoting *Julian v. Central Trust Co.*, 193 U.S. 93, 113-14 (1904)). And, even though allowing a judgment creditor to collect against an officer of the debtor who had transferred assets to himself surely would have helped the judgment creditor "secure or preserve the fruits . . . of a judgment," Gov't Br. 12 (citation and emphasis omitted), this Court in *Peacock* did not hesitate to

find that there was no ancillary jurisdiction over such an action. 516 U.S. at 356-59.

The holding of *Dietzsch* is "not remotely as permissive as its language." *Kokkonen*, 511 U.S. at 379. In *Dietzsch*, a replevin action had been removed to federal court resulting in a judgment that plaintiffs were entitled to the "goods and chattels" in question. *Kern v. Huidekoper*, 103 U.S. 485, 489 (1880). While the state court action proceeded to judgment in favor of the opposing party, this Court determined that the valid removal left the competing state court "without any case." *Id.* at 491. When defendants attempted to sue on the replevin bond in state court, the *Dietzsch* Court viewed their lawsuit as an attempt to "wrest[] the replevied property from the plaintiffs" based on a "pretended judgment of the State court, rendered in a case over which it had no jurisdiction." 103 U.S. at 497. Thus the ancillary jurisdiction exercised in *Dietzsch* flowed from the federal court's need to "vindicate its authority" over an obstreperous state court,[1] as well as the need to "effectuate" its ongoing decree regarding ownership of a specific *res*. *Kokkonen*, 511 U.S. at 380.

In contrast, the decision below is irreconcilable with *Peacock* or *Kokkonen*. The court's judgment was "finally satisfie[d]" prior to the anti-suit injunction. Pet. App. 63a. The district court's continued

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[1] In *Pacific Railroad v. Missouri Pacific Railway Co.*, 111 U.S. 505 (1884), it was alleged that the judgment had been procured by fraud, *id.* at 506, thus making the exercise of jurisdiction an example of a federal court vindicating its authority. *See also United States v. Beggerly*, 524 U.S. 38, 45-46 (1998) (discussing *Pacific Railroad*).

jurisdiction thus was not needed "to execute, or to guarantee eventual executability of, a federal judgment." *Peacock*, 516 U.S. at 357. Though Pertamina's foreign lawsuit "sought damages in the amount of the [arbitration award]," Pet. App. 12a, jurisdiction to stop the suit was "quite remote from what courts require in order to perform their functions." *Kokkonen*, 511 U.S. at 380.

II. THE SECOND AND FIFTH CIRCUIT DECISIONS ARE IRRECONCILABLE REGARDING THE PROPRIETY OF ANTI-SUIT INJUNCTIONS UNDER THE NEW YORK CONVENTION.

The Second and Fifth Circuits reached opposite results, by applying inconsistent reasoning, in addressing the role of U.S. courts in considering anti-suit injunctions as secondary tribunals under the New York Convention. The Fifth Circuit overturned an injunction based on the limited role of a court of secondary jurisdiction under the Convention. Pet. App. 172a-177a. It found that a decision confirming an arbitration award is "not truly a decision on the merits" and "is not necessarily given *res judicata* effect in foreign jurisdictions," *id.* at 184a, and that the United States has a much less significant interest in such a decision, *id.* at 187a. The Fifth Circuit's logic cannot be squared with the Second Circuit's decision, which treated the confirmation and turnover awards as "federal judgments" on par with merits decisions and ignored the Convention's policy of mutual self-restraint.

The Government Brief hardly alludes to these fundamental Convention concerns and thus renders the Fifth Circuit's decision unrecognizable. *See* Gov't Br. 3-4. Instead, it endorses the Second Circuit's attempt to distinguish the Fifth Circuit case on the basis of an insignificant difference in its procedural posture. *Id.* at 18. It is true that while the injunction issued by the Texas district court followed an order confirming the arbitral award, the injunction issued by the New York court followed the turnover of funds pursuant to the same confirmed award. But the entire purpose of the enforcement proceedings in Texas was to obtain funds to satisfy the arbitral award. Indeed, by the time of the Fifth Circuit decision in 2003, the award had been confirmed and the Texas district court had granted KBC leave to register the judgment in other states. Pet. App. 160a.

In concluding that the district court could enforce the award notwithstanding the Indonesian action, the Fifth Circuit – contrary to the Government Brief (at pp. 17-18) – was *not* concerned about the financial hardship the Indonesian court might impose. The Fifth Circuit was skeptical whether the hardship would materialize. But the court recognized that "Pertamina could have sought monetary relief in the Indonesian courts . . . and Indonesian courts, if truly determined to protect Pertamina at any cost, likely would have been willing to grant the relief requested." Pet. App. 178a. In other words, the Fifth Circuit would have reversed the injunction even in the face of a damages award from the Indonesian court.

The government also contends that the Fifth Circuit took account of the "colorable argument" that Indonesia was a court of primary jurisdiction. Gov't Br. 18. While the Fifth Circuit considered this hypothetical, it did not affect the court's decision. To the contrary, the Fifth Circuit was clear that "legal action in Indonesia, *regardless of its legitimacy*, does not interfere with the ability of U.S. courts . . . to enforce a foreign arbitral award." Pet. App. 184a (emphasis added).

The government finally argues that the injunction is proper because the "Convention strongly favors the use of arbitration as a means to settle disputes." Gov't Br. 15. The question here is not the merits of arbitration but whether an arbitral award precludes a foreign action. The Convention does not mandate that questions of res judicata be arbitrated – much less that a court of secondary jurisdiction should deprive foreign courts of the ability to decide such questions.

The Second Circuit decision encourages parties who prevail in foreign arbitration to initiate enforcement proceedings in the United States and, if successful, to seek an anti-suit injunction barring further actions that might implicate the funds they obtain. This result runs directly contrary to the Fifth Circuit's view that as courts of secondary jurisdiction, "the authority of U.S. courts is restricted to enforcing or refusing to enforce the arbitral award under the Convention." Pet. App. 180a-181a. The Second Circuit's holding therefore threatens to undermine the regime of self-restraint that sustains

the Convention. This case merits this Court's review.

III. THE GOVERNMENT UNDERSTATES THE SIGNIFICANCE OF THE NINE-CIRCUIT SPLIT REGARDING THE STANDARD FOR ISSUING ANTI-SUIT INJUNCTIONS.

The government contends that the widely recognized circuit split regarding the standard for anti-suit injunctions is little more than a verbal disagreement not worthy of this Court's attention. To the contrary, that split produces disparate outcomes dependent on the circuit in which a case is adjudicated. Courts struggling to resolve these complicated cases face a challenge made "particularly formidable given the absence of guidance from the Supreme Court . . . [regarding] the criteria for granting an international antisuit injunction." *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 16 (1st Cir. 2004).

The government cites isolated cases in which courts applying a permissive standard suggested that an anti-suit injunction also would be appropriate under a stricter standard. Gov't Br. 18-19. But the relevant question is whether there are cases in which an anti-suit injunction would be deemed appropriate under certain standards, but not others. There are. *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992), most clearly articulates the strictest approach, which is applied by the Sixth, Third, and Eighth Circuits. Applying

that standard to cases from circuits permitting anti-suit injunctions on the basis of equitable factors would produce markedly different results. In *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852 (9th Cir. 1981), for example, the Ninth Circuit affirmed an anti-suit injunction based on its conclusion that two separate actions would be "likely to result in unnecessary delay and substantial inconvenience and expense." *Id.* at 856. Similar equitable concerns sufficed to justify an anti-suit injunction in *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996). There was no finding in these cases that the parallel foreign litigation threatened the court's jurisdiction or an important public policy, and on the facts of those cases, no such threats existed – particularly as the conservative circuits narrowly construe them (*see infra*, pp. 11-12). Had these cases been decided in the strictest circuits, which hold that those two factors are the *only* relevant considerations, *see* Pet. 33, the courts would have been constrained to deny the anti-suit injunctions.

Conversely, had the movant in *Gau Shan* brought its case in any of the circuits that permit consideration of equitable factors – as the Second Circuit did in this case – its argument that an anti-suit injunction was "justified in order to prevent vexatious litigation in Hong Kong," 956 F.2d at 1355, might well have supported an injunction. In fact, the district court in *Gau Shan* so held. *Id.* at 1354-55.

The above cases illustrate that the standard can and does determine whether an anti-suit injunction will survive scrutiny. And indeed, the standard was

determinative in this case. The government's contrary argument, *see* Gov't Br. 21-22, ignores that the Second Circuit erroneously applied the threat-to-jurisdiction and public policy factors in a broad manner that stricter circuits reject. The Second Circuit found interference with jurisdiction from a foreign action that sought to recover the same amount of funds previously awarded by a U.S. court – after the U.S. proceeding was concluded and the judgment fully satisfied. That approach to the threat-to-jurisdiction factor is significantly more expansive than the approach that the Sixth and Eighth Circuits employ. In *Gau Shan*, the Sixth Circuit noted that "only two scenarios . . . have been held to threaten a court's jurisdiction": where the concurrent proceeding interferes with an *in rem* or *quasi in rem* matter, or attempts to carve out exclusive jurisdiction over an action. 956 F.2d at 1356.

The Eighth Circuit in *Goss* similarly found that the foreign action did not pose a threat of "*interdictory* jurisdiction" because the district court action had concluded. 491 F.3d at 365 (emphasis added). The same is true here. Pertamina's action in the Cayman Islands did not preclude the district court's exercise of its jurisdiction. Had the Second Circuit applied a similarly narrow conception of the threat-to-jurisdiction factor, it could not have affirmed the anti-suit injunction on that basis.

The Second Circuit also erred when it found that a public policy favoring international arbitration justified the anti-suit injunction. Pet. App. 32a. The Sixth Circuit in *Gau Shan* emphasized that public

policy concerns may bar foreign litigation only where the foreign proceedings are "repugnant to fundamental notions of what is decent and just." 956 F.2d at 1358 (internal quotation marks omitted); *accord Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 127 (3d Cir. 2002) (public policy factor has been "narrowly drawn"). Moreover, there is no basis to suggest that foreign courts would not respect principles favoring arbitration in determining whether Pertamina's fraud action was adjudicable.

This case presents an excellent opportunity for the Court to resolve the pervasive circuit conflict and articulate a coherent standard. As the First Circuit observed, the global economy "depends on cooperation, reciprocity, and respect among foreign nations." *Quaak*, 361 F.3d at 19. There is "enduring need" for a standard that gives due weight to international comity. *Id.* A clear ruling limiting anti-suit injunctions to genuine threats to a U.S. court's jurisdiction or vital domestic policies would signal U.S. courts' respect for foreign tribunals, and would encourage those courts to extend a like regard for the jurisdiction of the U.S. courts.

IV. THIS PETITION PRESENTS THE BEST VEHICLE FOR CERTIORARI.

The government finally suggests, again incorrectly, that *Goss* may present a better vehicle for certiorari than this case. Brief for the U.S. as Amicus Curiae, No. 07-618, 22 n.5. On the contrary, only the *Pertamina* matter presents the Court with an opportunity to consider the international treaty

implications of anti-suit injunctions under the New York Convention. In contrast, *Goss* implicates a statute that has been repealed by Congress. Also, the Second Circuit's decision below is incorrect. While both cases are cert-worthy, if the Court elects to review only one, it should be this one.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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